

## United States Senate

WASHINGTON, DC 20510-4904

July 17, 2006

The Honorable George W. Bush  
President of the United States  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

The Honorable Alberto Gonzales  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530

Dear Mr. President and Attorney General Gonzales:

As you know, the U.S. Supreme Court issued its decision in *Hamdan v. Rumsfeld* on June 29, 2006. In holding that the President could not move forward with military commissions that Congress had not authorized, the Supreme Court largely rejected your Administration's theory of unrestrained executive power. I write to urge that you reconsider your position that the NSA warrantless wiretapping program is legal, based on the *Hamdan* decision, and that you do so no later than the next periodic review of the program. While we strongly disagree about the merits of your earlier legal justification of the program, if you do not change your approach based on this clear Supreme Court ruling, your claim that this program is being undertaken in good faith based on sound legal authority will be even less credible.

The January 19, 2006, Justice Department paper entitled "Legal Authorities Supporting the Activities of the National Security Agency Described by the President" states that: "the President has established a system under which he authorizes the surveillance only for a limited period, typically for 45 days." The paper also states that the NSA activities are "carefully reviewed approximately every 45 days to ensure that [they are] being used properly" and that those activities "are reviewed for legality by the Department of Justice." Based on these public statements, it appears that sometime next month, the Administration will conduct its next regular review to evaluate whether the National Security Agency's authority to conduct warrantless electronic surveillance within the United States without complying with the Foreign Intelligence Surveillance Act ("FISA") should be renewed. I ask that any legal conclusions addressing the *Hamdan* decision be included in the next periodic review of the wiretapping program, if not earlier, and that you share those conclusions with the congressional intelligence and judiciary committees.

In *Hamdan*, the Court rejected the government's argument that the Authorization for Use of Military Force (AUMF) passed by Congress in September 2001 authorized military commissions or somehow modified the existing provision on

such commissions in the Uniform Code of Military Justice. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2755 (2006) ("there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ."). Justice Kennedy's concurring opinion, while acknowledging the President's Article II authority as Commander in Chief, goes on to make clear that under the three-part *Youngstown* analysis, the President must follow the statutes that Congress writes: This "is a case where Congress, in the proper exercise of its powers as an independent branch of government, ... has considered the subject of military tribunals and set limits on the President's authority." *Id.* at 2799 (Kennedy, J. concurring); see also *id.* at 2808 ("[W]e must apply the standards Congress has provided.").

The Justice Department sent a letter to Senator Schumer on July 10, 2006, stating that *Hamdan* had not changed its legal justification for the NSA's warrantless wiretapping program. Assistant Attorney General Stephen Bradbury advanced that argument in his testimony before the Senate Judiciary Committee last week. I find these efforts to play down the significance of *Hamdan* to be wholly unconvincing. In fact, a group of distinguished law professors last week expressed their view that the Department's legal analysis of *Hamdan* is erroneous and that the *Hamdan* decision "significantly weakens the Administration's legal footing" and "strongly supports the conclusion that the President's NSA surveillance program is unlawful."

These law professors, of course, like me, have believed from the start that the NSA program was illegal. It is noteworthy, however, that two defenders of the legality of the program, Professor Cass Sunstein and former federal prosecutor Andrew McCarthy, also view the decision in *Hamdan* as significantly undercutting the Administration's position.

It is the President's obligation under the Constitution to "take Care that the Laws be faithfully executed." Now that the Supreme Court has rejected in *Hamdan* the weak justifications upon which the Department of Justice has relied in approving the program in the past, I urge you to finally recognize what has been clear to most observers for some time -- that the NSA warrantless wiretapping program has no legal basis. The *Hamdan* decision confirms this conclusion. The Administration cannot claim that it is proceeding in good faith based on sound legal advice if it reauthorizes the warrantless wiretapping program after *Hamdan*.

Sincerely,



Russ Feingold  
U.S. Senator